

HR Weekly Podcast

11-12-14

Today is November 12, 2014, and welcome to the HR weekly podcast from the State Human Resources Division. Today's topic concerns a discrimination case regarding the falsification of an employment application.

In *Busch v. Wal-Mart Stores*, Andrew Busch filled out an employment application with Wal-Mart and failed to complete the "Criminal Convictions" section on the Fair Credit Reporting Act, or FCRA, authorization form. Busch did not disclose on the form that he had pled guilty to Failing to File a Federal Tax Return which is a misdemeanor. As a result of the guilty plea, Busch was convicted in August of 2005 and sentenced to three years' probation and suspended from the practice of law for six months.

Wal-Mart conducted a state criminal background check on Busch which did not reveal the federal misdemeanor conviction. In July 2008, Busch was subsequently hired by Wal-Mart as an Accommodations Services Manager. After receiving an anonymous tip from a Wal-Mart associate, Wal-Mart discovered that Busch falsified his application by not disclosing the misdemeanor. Wal-Mart terminated Busch's employment on February 4, 2011, due to the falsification of his employment application.

Busch claims his failure to disclose the conviction was not intentional and, therefore, did not rise to the level of falsification under Wal-Mart's policy. In addition, he did not disclose the misdemeanor because it was not a theft, fraud, or violent crime. Busch further argued that he did not complete his employment documents due to his depressive disorder and attention deficit/hyperactivity disorder which also contributed to his failure to file his income taxes. Busch contends that Wal-Mart should have made a reasonable accommodation because of his disabilities by overlooking his failure to disclose the conviction and allowing him to remain a Wal-Mart employee.

The court, however, ruled that "offering post-hoc rationalizations for his admitted behavior and attributing those excuses to his disabilities are insufficient to show that Wal-Mart fired him because of his disability." The court noted that Wal-Mart had granted Busch accommodations such as a second computer monitor, a program that converted his dictation into typed pages, and moved him away from a disruptive co-worker.

According to the court's decision, Busch did not make a prima-facie case of discrimination and, even if he had, Wal-Mart had a nondiscriminatory reason for terminating his employment. The court indicated that Wal-Mart had proof Busch was terminated due to his falsification of the employment application not because of his disabilities.

The court stated that "Mr. Busch offers excuses for his failure to disclose his criminal misdemeanor, and argues that Wal-Mart should have known that his disabilities caused him to commit the crime, and subsequently caused him to accidentally omit this information on his employment records. However, it is not the court's role to engage in second-guessing Wal-Mart's business decision to terminate Mr. Busch for an otherwise legitimate reason." Thank you.